IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

FRIDAY, THE 28TH SEPTEMBER 2007 / 6TH ASWINA 1929

SA.No. 30 of 2000(C)

AS.2/1993 of ADDL. DISTRICT COURT, PATHANAMTHITTA
OS.547/1988 of MUNSIFF COURT, PATHANAMTHITTA

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APPELLANT: RESPONDENT - PLAINTIFF

P.M.PHILIP, S/O. MATHEW,
PADINJATTEDATHU,
PUNNAKKATTU MURI,
MALLAPPUZHASSERY VILLAGE.

BY ADV. SRI.S.ANANTHASUBRAMANIAN
SRI.V.EAPEN MATHAI
SMT.REKHA VASUDEVAN

RESPONDENT: APPELLANT - DEFENDANT

T.P. THOMAS, S/O. PHILIPOSE,
THEKKUMKATTIL VEEDU,
PUNNAKKATTU MURI,
MALLAPUZHASSERY VILLAGE,
PATHANAMTHITTA.

BY SRI.SATHISH NINAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 28/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

HARUN-UL-RASHID, J.

S.A. 30 OF 2000 & CROSS-OBJECTIONS.

Dated: September 28, 2007

JUDGMENT

The appellant herein is the plaintiff in O.S.No.547/1988 on the file of the Munsiff's Court, Pathanamthitta. OS No.547/1988 is a suit for injunction restraining the defendant from trespassing upon the plaint schedule properties, demolishing the boundaries, blocking canal and widening the thodu which lies in between the plaint schedule items 1 and 2. The plaint averments are that suit items 1 and 2 form part of a larger extent and suit item No.1 situate on the eastern side of item No.2, that the plaintiff obtained title to item No.1 as per Ext.A1 sale deed dated 28.4.1965, that there is a thodu by name Kottakkuzhi thodu having a width of 1½ ft. in between plaint schedule Items 1 and 2 which is occasionally used as a pathway, and that there are mud boundaries on the eastern side of item No.2 and on the western side of item No.1 on either side of the thodu. Apprehending trespass into the plaint schedule property, the above suit was filed for permanent injunction.

2. The respondent/defendant in his written statement contended that the pathway in between item Nos.1 and 2 has been using for ingress and egress from and to his house on the south for the last more than 65 years peacefully, openly and uninterruptedly as of right. According to the defendant, the plaintiff has no right over the pathway and that he has been attempting to dispossess the defendant. The defendant also filed a counter claim praying for a declaration of

his right of easement of way over the pathway which lies in between the plaint schedule items 1 and 2.

3. The plaintiff examined Pws.1 to 3 and marked Exts.A1 and A2. DW.1 was examined and Exts.B1 and B2 are marked on the side of the defendant. Exts.C1 to C3 are also marked on the side of the plaintiff.

4. The trial court on evaluation of the evidence came to the conclusion that the suit is maintainable and that the defendant has alternate convenient pathway on the southern side of his property in addition to the thodu on the north and west and hence the claim for an easement of necessity will fail. It was further held that the defendant has failed to establish the continuous user of 20 years as of right of the pathway scheduled in the counter claim in assertion of the title of the plaintiff peacefully and openly and hence he has got absolutely no right over the plaint items and he is not entitled to get the declaration. The trial court also held that the plaintiff is entitled to get a permanent injunction restraining the defendant from committing trespass into the plaint schedule property and committing waste. Thus the trial court decreed the suit and dismissed the counter claim set forth by the defendant.

5. The trial court extracted the recitals in Ext.B1 which shows that the thodu portion was earmarked in between the properties of the sharers which can be used for transportation. According to the defendant the said recitals would show that the pathway mentioned therein is the one mentioned in his counter claim which lies in between the plaint schedule items 1 and 2.

6. The trial court after discussing the oral and documentary evidence came to the conclusion that the thodu is being used as a pathway to reach the panchayat road on the north through the pathway in between Kannathu and Edayadi purayidoms and that it was carved out to maintain the boundaries only is not true. The trial court also held that the testimonies of Pws.1 to 3 would suggestively gather the inference that there is possibility of the defendant to pass through the alleged thodu occasionally to reach the Panakkal junction on the north. The trial court also after referring to Exts.C2 mahazar and C3 sketch, and the contentions raised by the plaintiff that the description of the thodu as 110 ft. length and 4 ft. width in the counter claim cannot be considered as on surmises. The court also referred to the recitals in Ext.A1 sale deed in favour of the plaintiff and again gathered the inference that the thodu was in existence and was used as a pathway even after 39 years of the date of execution of Ext.A1. After referring to the oral and documentary evidence, ultimately the trial court came to the conclusion that the case set up by the defendant that he has been using the thodu scheduled in the counter claim for his ingress and egress for the last 20 years as of right is not supported by satisfactory evidence. The court also noticed the fact that the defendant has not examined any person in support of his claim of right of way.

7. The lower appellate court after referring to the findings of the trial court in paragraphs 12, 14 and 17, entered the finding concurrently that there exists a pathway in between suit items 1 and 2. The lower appellate court also found

that the trial court granted a decree in favour of the plaintiff and dismissed the counter claim on the ground that the defendant has failed to establish his continuous user for 20 years as of right of the pathway scheduled in the counter claim in assertion of the title of the plaintiff peacefully and openly and he has got absolutely no right over the suit properties and therefore he is not entitled to the declaration prayed for in the counter claim. The lower appellate court also noticed the pleadings in the plaint which evidently shows the existence of the Kottakkuzhi thodu in between plaint items 1 and 2 which was used for ingress and egress. The court below also noticed the fact that the right of way is created under Ext.B1 title deed dated 20.10.1101 ME and entered the finding that the recitals in Ext.B1 amounts to an express grant and that in such a situation the question of easement of necessity or prescriptive easement right need not be looked into. The court also noticed the report of the commissioner who has reported that there is a pathway having an average width of 4 ft. 2 inches and length of 114 ft. and held that the attempt of the plaintiff was to obstruct the defendant's user of the pathway which he obtained by virtue of a grant. In the light of the detailed discussions on the subject, the lower appellate court held that the appellant is entitled to get easementary right by grant along the pathway as described in the commissioner's report and therefore the decree and judgment under appeal was set aside and the counter claim of the defendant was allowed granting a decree declaring easement right by grant. The lower appellate court dismissed OS No.5471988 and set aside the decree

and judgment granting prohibitory injunction.

8. I have heard both sides and gone through the peladings in the written statement and the counter claim filed by the respondent/defendant. I find that there is no pleading to the effect that the defendant has got right over the pathway by way of grant, but the pleadings in the counter claim will show that the right set up is by way of easement by prescription and by way of necessity. At the same time, going by the evidence on record, both oral and documentary, including Ext.B1 partition deed and the pleadings in the plaint, the appellate court found that the defendant has got a right of way by grant. Since there is lack of pleadings in the counter claim, the appellate court was not justified in granting the declaration of the right of way as contended by the defendant. At the same time, both parties cannot deny the existence of the pathway and the recitals in Ext.B1 which will go to show that the alleged right of way is not by way of easement by prescription or by necessity, but by way of grant. The question whether the respondent/defendant is entitled to a declaration of right of way over the thodu between plaint items 1 and 2 is a matter to be decided on the basis of pleadings and evidence. In such circumstances, the matter has to be re-tried by the trial court after giving the parties an opportunity to amend the pleadings and permit to adduce further evidence, if any, in support of their respective claims. The learned counsel for the respondent submitted that it is the duty of the plaintiff who had approached this court for permanent injunction claiming to be the owner of the property, to prove that he was the owner of the property, the

said property remained in his possession and that the defendant had no right, title or interest therein. The learned counsel contended that in view of the recitals in the plaint that the Kottakkuzhi thodu is used as a pathway, the relief of injunction cannot be granted for the entire property including the pathway. According to me this is also a matter which the trial court can consider while deciding the matter afresh. The amendment of the pleadings is limited only to the question whether the defendant has got right of way by way of grant.

The judgment and decree passed by the appellate court and the trial court are hereby set aside. The appeal is remanded to the trial court for de novo consideration of the questions in dispute raised between the parties. The parties are at liberty to adduce evidence on the basis of the respective pleadings to be raised before the trial court. The trial court is directed to try and dispose of the case as expeditiously as possible, at any rate, within six months from the date of receipt of a copy of this judgment and the records. There will be no order as to costs. The parties shall appear before the court below on 24.10.2007.

Transmit the records immediately.

HARUN-UL-RASHID
JUDGE

mt/-

HARUN-UL-RASHID, J.

SA. No.30/200 &
CROSS-OBJECTIONS

JUDGMENT

28.9.2007